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# In the Supreme Court of the United States

OCTOBER TERM, 1979

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, ET AL.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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WADE H. MCCREE, JR.
*Solicitor General*

LAWRENCE G. WALLACE
*Deputy Solicitor General*

STEPHEN M. SHAPIRO
*Assistant to the Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

WILLIAM A. LUBBERS
*General Counsel*

JOHN E. HIGGINS, JR.
*Deputy General Counsel*

ROBERT E. ALLEN
*Acting Associate General Counsel*

NORTON J. COME
*Deputy Associate General Counsel*

LINDA SHER
*Assistant General Counsel*

HOWARD E. PERLSTEIN
*Attorney*
*National Labor Relations Board*
*Washington, D.C. 20570*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-83a) is not yet officially reported. The decisions and orders of the National Labor Relations Board (Pet. App. 90a-109a, 110a-184a; A. 465-468) are reported at 231 N.L.R.B. 351 and 236 N.L.R.B. 525.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 84a-86a) was entered on September 25, 1979. The Board's petitions for rehearing and rehearing en banc were denied on December 13, 1979 (Pet. App. 87a-89a). The petition for a writ of certiorari was filed on January 10, 1980, and was granted on January 21, 1980 (A. 635). This Court's jurisdiction rests on 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that contractual provisions adopted by the union and the employer-organizations to deal with containerization in the shipping industry enlarged, rather than preserved, work opportunities for employees represented by the union, and that such provisions therefore violated Section 8(e) of the National Labor Relations Act and union action to enforce them violated Section 8(b)(4)(B) of the Act.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (29 U.S.C. 151 *et seq.*) are as follows:

1. Section 8(b), 29 U.S.C. 158(b), provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> 4(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is:
>
> * * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * * *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful * * * any primary strike, or primary picketing; * * *



2. Section 8(e), 29 U.S.C. 158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcable and void * * *

## STATEMENT

### Introduction

The controversy in this case focuses on the response of the longshoremen's union and the shipping industry to containerization—a technological innovation

that fundamentally changed not only the method for loading ships, but also the method by which inland shippers transport their cargo to and from the docks.

Containers are large metal boxes, ranging in length from 20 to 40 feet, which hold up to 30,000 pounds of all types of freight. They can be affixed to a truck chassis and transported unopened to and from the pier. Before the advent of containerization, trucks delivered the goods of shippers in loose form to the dock site. Longshoremen, represented by respondent International Longshoremen's Association (ILA), then loaded the goods aboard vessels. Similarly, longshoremen unloaded incoming vessels and placed their cargoes on the pier for pick-up by truckers.

After the introduction of containers in the shipping industry, shippers began to load (or stuff) containers at their place of business or at the terminal of a company offering such services.[1] Shippers then trucked the containers directly to the pier for loading aboard ship without additional handling of their cargo. Similarly, shippers arranged to have their containerized cargo unloaded from ships and trucked either to an inland terminal or to the ultimate recipient for unloading (stripping).

Shippers who did not have a sufficient quantity of goods to fill a container avoided having their goods delivered to the pier in loose form—with the attendant risk of theft, damage and delay—by employing

[1] Containers of this kind, holding the goods of one beneficial owner, are called full shipper's loads (FSL) (A. 9, 20, 43, 57, 67, 92, 126, 140, 183, 215).



the services of a freight consolidator. The consolidator combined the goods of various shippers into a container at its off-pier terminal and transported the container to the pier.[2] In addition, consolidators trucked incoming containers of cargo to their off-pier terminals, where they stripped the containers, sorted the cargo, and loaded the cargo onto trucks for delivery to customers.

Freight consolidators ordinarily operate no transportation equipment of their own except for pick-up and delivery equipment. Consolidators contract with equipment operating carriers, including truckers and steamship lines, for the actual transportation of the goods of their shipper-customers. See Comment, *Intermodal Transportation and the Freight Forwarder*, 76 Yale L.J. 1360, 1362 (1967). A consolidator who acts as a carrier by arranging for the transportation of goods from port to port is designated a non-vessel operating common carrier by water (NVOCC), and is regulated by the Federal Maritime Commission (FMC) (A. 473, 490, 511-516, 538-539). A report of the FMC describes NVOCCs as follows (*Preliminary Staff Report on Non-Vessel Operating Common Carriers by Water* 2-4 (Dec. 8, 1970)):

> The NVOCC is a carrier who holds himself out to the public to provide through transportation, a portion of which moves by water, and

[2] The goods of two or more shippers that are transported in a single container are known as less-than-container-load (LCL) or less-than-trailer-load (LTL) cargo (A. 9, 108, 139-140).

who assumes responsibility for the through transportation, including the water portion, although not owning or controlling the vessel by which the water portion of the movement is effected.

* * * * *

The basic function of the NVOCC is the placing of several small shipments into one large container at one end of the movement and the removal of those shipments from the containers and distribution thereof at the other end. Because the NVOCC (at least in the Puerto Rican trade) pays a flat rate per container charge, but receives a per pound or per foot rate from the shipper, it has the incentive to load the containers as efficiently as possible. * * *

One of the most important benefits of the NVOCC service is one of coordination and control of the traffic. For example, a cargo may take three to four weeks to travel from Chicago to Mayaguez via separate carriers but with close coordination the NVOCC can achieve a seven day delivery. With this coordinated control over the shipment, a continuous movement is assured because the NVOCC maintains close liaison with the steamship companies regarding sailings, close-out times, dock conditions, and every fact relating to pickup and delivery of containers on the piers. The documentation system employed by the NVOCCs includes pre-notification to its destination terminal of the contents of each container arriving on the ship and thus containers preloaded for delivery can be moved directly from the pier on arrival to destination. * * *

In substance, the NVOCC acts as a common carrier by water. It publishes a tariff, quoting



through rates for the transportation offered, and issues to the shippers its own bill of lading. The NVOCC prepares waybills, bills of lading, and manifests for the underlying carrier. He collects the through charges, provides handling services, routes and traces shipments, settles claims, performs transfer services on interline shipments and actively solicits freight.

The present case involves two Board proceedings, consolidated on appeal, that consider some of the implications under the National Labor Relations Act of containerization.[3] The first ("Dolphin") concerns the handling of LCL cargo (see note 2, *supra*) in the Port of New York. The second ("Associated Transport") concerns the handling of FSL cargo (see note 1, *supra*) in the ports of Hampton Roads, Virginia, and Baltimore, Maryland. We describe the facts in each proceeding separately.

### 1. The Board's Findings of Fact

#### a. *The Port of New York (the "Dolphin" case)*

##### i. *Containerization and LCL Cargo*

Prior to World War II, gangs of longshoremen handled most solid cargo moving over the New York piers on a piece-by-piece or break-bulk basis. Then, as now, trucks delivered break-bulk cargo in loose form to the head of the pier. A clerk checked in each truck and directed it to a bay on the pier for un-

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[3] *International Longshoremen's Association, et al. (Associated Transport, Inc.)*, 231 N.L.R.B. 351 (1977), and *International Longshoremen's Association and New York Shipping Association, Inc. (Dolphin Forwarding, Inc.)*, 236 N.L.R.B. 525 (1978).

loading. The driver placed the cargo on the truck's tailgate, a checker tallied it, and a freight handler moved it from the tailgate to a pre-assigned point on the pier. Longshoremen then stacked the cargo on wooden pallets and moved it by fork-lift to the side of the ship. Finally, longshoremen attached a sling or hook to the cargo pallet and lifted it into the ship's hold for stowage. The opposite process applied to cargo from incoming ships. Longshoremen broke down and sorted the cargo and truckers picked it up at the pier for delivery to the ultimate consignee (A. 109-114, 134-135, 150, 158, 168, 210-211, 229).

In the late 1940's longshoremen began to stuff loose cargo sent directly to the piers into large wooden boxes and metal containers for shipment on vessels carrying cargo to and from Puerto Rico (A. 115-116, 150). During this same period, consolidators (employing workers not represented by ILA), who traditionally had solicited, received and combined small shipments of goods from their own customers and transported those goods from their off-pier facilities to the piers, also began to stuff their customers' goods into containers and truck them to the piers for loading aboard ship. See *International Longshoremen's Association, AFL-CIO (Consolidated Express, Inc.)*, 221 N.L.R.B. 956, 959-960 (1975) (hereinafter called *Conex*).[4]

[4] Prior to containerization, consolidators, operating at their own terminals, would combine goods from a number of customers that were destined for shipment on a particular vessel. These goods would be stacked together and trucked to the pier. (A. 111, 131, 145, 210). Containerization modified this procedure by enabling the consolidator to place all such goods destined for a particular ship in a single container prior to delivery to the pier (A. 211) (*Conex, supra*, 221 N.L.R.B. at 956, 959).



In the decade between the mid-1950's and the mid-1960's, steamship companies began to use fully containerized ships that were specifically constructed to carry 20-, 35-, and 40-foot long metal containers (A. 117, 135, 212). Thereafter, greatly increased amounts of cargo passing in and out of the Port of New York moved in these containers (A. 118, 135, 154, 509-512 (*Conex, supra*, 221 N.L.R.B. at 957, 964, 968).

As the use of containerized vessels increased, consolidators delivered more cargo to the piers in containers. Consolidators also began to pick up containers arriving on inbound ships and stripped them at their off-pier facilities prior to delivery to their customers. *Conex, supra*, 221 N.L.R.B. at 956-957. During this period, longshoremen continued to stuff containers at the piers. However, they stuffed only cargo sent directly to the piers in loose form by the steamship companies' customers. *Conex, supra*, 221 N.L.R.B. at 959 n.16, 973 n.8.

ii. *The Rules on Containers*

In 1959, ILA and the New York Shipping Association (NYSA)[5] negotiated a collective-bargaining

[5] NYSA is an organization of employers, including steamship and stevedoring companies, who transport cargo and passengers by water into and out of the Port of New York. NYSA conducts collective bargaining negotiations with the ILA on behalf of its members. *Conex, supra*, 221 N.L.R.B. at 957. Since 1970, the Council of North Atlantic Shipping

agreement that expressly recognized the right of NYSA members "to use any and all type of containers without restriction or stripping" by ILA labor at the pier (A. 118-122). In return, NYSA agreed to contribute certain royalty payments on "containers which are loaded or unloaded away from the pier by non-ILA labor" (A. 142, 152, 155, 168).[6] The agreement allocated to ILA only the work of stuffing and stripping the cargo of the steamship lines' own customers, not the cargo of shippers who utilized the services of off-pier consolidators or freight forwarders. *Conex*, *supra*, 221 N.L.R.B. at 957, 960, 968-969. See also *Balicer* v. *International Longshoremen's Association*, 364 F. Supp. 205, 222 (D. N.J. 1973).

In 1967, ILA demanded in collective-bargaining negotiations with NYSA that, in the future, longshoremen stuff and strip *all* containers crossing the New York piers (A. 123). In February 1969, after a lengthy strike, the parties agreed upon detailed provisions governing containerization—the "Rules on Containers"—which since then have appeared, as

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Associations (CONASA), a multi-employer bargaining association representing shipping associations (including NYSA, Steamship Trade Association of Baltimore (STA), and the Hampton Roads Shipping Association (HRSA)), has bargained with ILA on a master-contract basis over terms and conditions of employment of longshoremen employed by members of the employer organizations (A. 17, 89, 91, 94, 136).

[6] The royalty on containers stuffed or stripped away from the pier by non-ILA labor presently is $2 per gross ton, or $30 for a modern container holding 15 gross tons of cargo (A. 18, 95-96, 147-148, 150-151, 214).



modified, in every NYSA-ILA contract, and later in every CONASA-ILA contract (see note 5, *supra*) (A. 123).[7] The Rules on Containers provided that ILA-represented longshoremen must strip and restuff into empty containers all LCL cargo arriving in containers owned or leased by NYSA members and originating within 50 miles of the Port of New York. The Rules required this procedure even if the containers already had been stuffed off the pier by consolidators and thus were ready for immediate loading aboard a containership. Similarly, the Rules required that ILA labor strip all incoming LCL cargo carried in containers and destined for a point within 50 miles of the Port of New York. After this stripping operation, ILA labor would place the cargo loose on the pier, where it could be picked up by consolidators or other agents of shippers. If a steamship company failed to have longshoremen perform such work, the Rules required the company to pay liquidated damages into the Container Royalty Fund (App., *infra*, 3a-4a, 8a).[8] See *Conex*, *supra*, 221 N.L.R.B. at 957-959.

In January 1973, ILA and CONASA executed the "Dublin Supplement" to the Rules on Containers. Among other things, the Dublin Supplement sought to prevent evasion of the Rules by flatly forbidding steamship companies to supply empty containers to consolidators who sought to conduct business as they

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[7] The Rules (A. 139) appear in the Appendix to this brief, *infra*, 1a-13a.

[8] In 1970, the liquidated damages penalty was raised to its present level of $1000 per container (A. 240, 249).

had in the past (A. 267-268). See *Conex*, *supra*, 221 N.L.R.B. at 969-970. (App., *infra*, 4a-5a, 8a.)

iii. *Application of the Rules on Containers to Consolidators*

Dolphin Forwarding, Inc. (Dolphin) and San Juan Freight Forwarding, Inc. (San Juan) served as NVOCC consolidators (A. 473, 490, 527, 538, 540, 548-549). They solicited business from manufacturers and other shippers located throughout the United States who needed to transport LCL cargo between New York and Puerto Rico (A. 474, 481-482, 490, 509-510, 534-535). These shippers arranged to deliver their LCL cargo to the consolidators' facilities, which were located within a 50-mile radius of the Port of New York (A. 474, 490, 513, 518-519, 536, 539).[9] Dolphin and San Juan received their customers' goods at their off-pier facilities, and, using non-ILA labor, consolidated the goods with those of other customers and stuffed them into containers provided by NYSA-member steamship companies (A. 474-477, 482-483, 485, 488, 490-492, 497, 513-515, 519-525, 527-528, 536).[10] The consolidators hired truckers to

[9] Dolphin's terminal was located in New Jersey; San Juan leased space in Manhattan (A. 474, 492, 497-498, 528, 538, 548-549).

[10] Dolphin and San Juan obtained containers from Trans-America Trailer Transport, Inc. (TTT) until August 1974. After that date, they used containers supplied by Maritime Transportation Management, Inc. (MTM) and Puerto Rico Marine Management, Inc. (PRMMI). Puerto Rico Maritime Shipping Authority (PRMSA), an instrumentality of the



transport the filled containers to the dockside facilities of the steamship companies for loading onto ships by longshoremen (A. 476, 484-485, 488, 491, 525-526, 528).

Beginning on August 24, 1974, and continuing through January 23, 1975, the NYSA-ILA Container Committee assessed liquidated damages of approximately $47,000 against NYSA members TTT and MTM (see note 10, *supra*). Those fines were imposed because the steamship companies provided containers to Dolphin and San Juan, who did not utilize ILA labor. As a result, TTT and MTM informed the consolidators that they would no longer supply them with containers or provide space aboard their vessels. Thereafter, TTT and MTM ceased doing business with Dolphin and San Juan (A. 479-481, 485, 487-488, 498-499, 512, 529-533, 550, 552-568).[11]

b. *The Ports of Baltimore and Hampton Roads (the "Associated Transport" case)*

i. *Containerization and FSL Cargo*

Fully containerized ships first appeared in the Ports of Baltimore and Hampton Roads in 1965 (A.

Commonwealth of Puerto Rico that owned container vessels operating in the Puerto Rico-New York trade, engaged MTM and PRMMI to manage and operate those vessels (A. 470, 476-478, 487, 491, 496-497, 498, 527, 539, 544-545, 546-548).

[11] Dolphin and San Juan could not conduct their businesses unless they had access to empty containers owned by the steamship lines (A. 488, 499). Even if the consolidators were able to obtain containers from other sources that would fit the TTT and MTM ships, the Rules appear to preclude use of such containers (A. 533). See App., *infra*, 3a.

9, 12, 24-25, 51, 74, 78, 91, 159-160, 176, 212). During the ensuing decade, ships carried a greatly increased amount of import cargo in containers (A. 92, 103, 136, 154, 160).

Houff Transport, Inc. (Houff) and Associated Transport, Inc. (Associated)[12] are ICC-licensed common carriers engaged, *inter alia*, in the business of transporting FSL containers to and from the pier for their customers (A. 23-25, 30, 34, 56, 182, 200). Houff, a non-union business, has operated truck terminals in Baltimore, Maryland, since 1946 and in Norfolk, Virginia, since 1952 (A. 23, 33, 188). Associated, which employs Teamster-represented drivers, has operated a truck terminal in Virginia Beach since the 1960's (A. 42, 56-57, 200).

Following the introduction of containers in the shipping industry, shippers or agents of consignees hired truckers such as Houff and Associated to transport containers (A. 24-25, 30, 51, 57, 64, 67, 74, 183, 189, 191, 197).[13] The shipper or agent provided the trucker with a delivery order, which directed the

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[12] Associated is a member of Tidewater Motor Truck Association (TMTA), an association of 28 truckers who operate in the Hampton Roads area (A. 197). TMTA intervened in the court of appeals.

[13] Prior to the advent of containerization, Houff and Associated picked up loose import cargo at the piers in Baltimore and Hampton Roads and hauled it at their customers' direction to the ultimate consignee (A. 159, 200). Although Houff and Associated operated terminals to facilitate the transportation of cargo, they did not operate warehouses (A. 77-78) (see *infra*, page 17 note 16, page 18 note 18).



steamship company to release the container to the trucker (A. 24-25, 31, 49, 51-52, 57-59, 68, 72, 172, 183, 287, 303).[14] The bill of lading—a contract between the shipper and the trucker, to which the steamship company was not a party—made the trucker responsible for the FSL cargo from the time he picked it up at the pier until he delivered it to its destination (A. 48-49, 52, 59, 67-68, 72, 76, 88, 202-203, 298-299). Unless the consignee requested and paid a premium for "exclusive use of the equipment," the trucker could open the container and transfer its contents before making delivery (A. 26-27, 30-31, 45, 49-50, 54, 62-63, 84, 129-130, 144, 194, 204).[15]

After picking up sealed FSL containers from the pier, truckers such as Houff and Associated hauled them to their off-pier terminals where they either left the containers intact for delivery to the consignee or directed their own employees to strip the cargo and

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[14] If a steamship company owned the container, a trucker could not obtain custody of the container unless an Equipment Interchange Agreement was in effect between the trucker and the steamship company. Such an agreement set forth the rights and obligations of the trucker when he received custody of the steamship company's container and prescribed the per diem charge paid by the trucker for the use of the container (A. 29, 36, 46, 50, 58-61, 73, 184, 289-297, 409-419, 522). However, the interchange agreement did not control the trucker's movement of the cargo (A. 31, 50, 62, 66, 73, 188-189, 204). As discussed above, that was governed by the bill of lading (A. 67, 84, 88, 192, 204).

[15] The bill of lading typically provided that the trucker was not "bound to transport [the cargo] by any particular * * * vehicle" (A. 299).

stuff it into one of the trucker's trailers prior to delivery (A. 12-13, 25-26, 43-45, 52, 54, 56, 67-68, 70, 74, 83, 162-163, 169, 187-188, 224).

For a number of years, Associated and Houff routinely stripped FSL containers and stuffed the cargo into their own vehicles when necessary. This practice is referred to as "short-stopping." For example, if Associated picked up two 20-foot containers destined for the same consignee, it would stuff the contents of both containers into one of its 45-foot trailers rather than haul the containers separately with two of its tractors. This would substantially reduce the trucker's direct labor costs and variable expenses including gasoline and oil. In other instances, truckers stripped containers because the container load was improperly balanced, or because the route to the consignee was too hazardous for the hauling of a large container, or the unstripped container was too heavy to meet state highway and bridge weight restrictions (A. 28, 32-33, 35, 44, 53, 63, 69, 73-74, 146, 185-186, 302). It was also economical for truckers to strip containers and return them promptly because they paid a daily rental fee to the steamship company for use of the containers (A. 66, 69, 73-74, 198-199).

ii. *Extension of the Rules on Containers to FSL Cargo*

In 1968 ILA, the Steamship Trade Association of Baltimore (STA), and the Hampton Roads Shipping Association (HRSA), agreed to the Rules on Containers during collective bargaining negotiations (A. 10, 11, 13, 90, 161, 169, 213, 222, 235-242, 270-276).



At that time, the Rules applied only to LCL cargo. No provisions in the Rules required ILA labor to strip FSL cargo at the pier until 1974 (A. 11-15, 22, 36-39, 94, 96-98, 102, 163, 176-177; 238, 243-249, 273, 280).[16]

Since 1974, the Rules have provided that ILA labor must strip all FSL containers that otherwise would be stripped "by other than [the consignee's] own employees" within 50 miles of the ports (App., *infra*, 4a) (A. 40, 127, 132-133, 180-181, 256, 280).[17] The amended Rules also provide that, while FSL cargo consigned to the beneficial owner's place of business or warehoused for 30 days within the port area need not be stripped by ILA labor, a royalty must be paid to the Container Royalty Fund for each such container not stripped by longshoremen (App., *infra*, 5a-6a, 12a-13a) (A. 17, 38, 95, 214, 255, 257-258, 263, 281, 286).

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[16] Prior to 1974, ILA labor stripped FSL containers at the pier only at the request of consignees (A. 9, 12, 15, 21, 90, 95, 224). Truckers routinely hauled FSL containers holding cargo that was consigned to warehouses located within 50 miles of the port, where warehouse employees stripped them, except for the period 1969-1973 when longshoremen stripped those containers at the pier. In January 1973, as a result of the Dublin Supplement to the Rules, truckers were permitted to resume hauling FSL containers to port area warehouses without stripping by longshoremen provided the cargo was stored there at least 30 days (A. 14, 17, 40-41, 78-81, 84-87, 137, 144-145, 164-165, 170, 172-173, 266). See App., *infra*, 6a-7a.

[17] Since 1971, the Rules in effect in New York, Baltimore, and Hampton Roads, which were negotiated by CONASA on behalf of NYSA, STA, and HRSA, have been identical (A. 10, 19, 123-124, 140). See App., *infra*, 1a-13a.

The effect of these Rules, as clarified in 1975,[18] is that whenever a trucker strips an FSL container with his own employees at an off-pier terminal located within 50 miles of the port, the steamship company that owns that container becomes liable for liquidated damages of $1000 per container (A. 16-17, 166-167, 260, 284).

iii. *Application of the Rules on Containers to Truckers*

After the new Rules became effective, Houff's employees, stationed at its Baltimore area truck terminal within 50 miles of the port, stripped containers picked up from United States Lines (USL) and Lavino Shipping Company (Lavino). They then stuffed the contents into Houff trucks for transport to its customers in West Virginia. Houff had found the containers to be overloaded and unsafe and determined that their rental was a needless expense (A. 27-29, 33, 183-184). Pursuant to the Rules on Containers, USL and Lavino were subsequently assessed liquidated damages of $2000 and $1000. When Houff refused to reimburse these expenses, USL and Lavino cancelled their interchange agreements with Houff

[18] In 1975, after a suspension of the Rules by ILA resulted in a resumption of the practice by longshoremen of stripping all import containers consigned to warehouses in the port area, the Rules were clarified to provide that "trucking stations where containers are unloaded within the geographic area do not constitute bona fide public warehouses even where cargo is destined for delivery outside the geographic area." (A. 15, 81-83, 85-86, 138-139, 145, 164-165, 171-173.) See App., *infra*, 7a.



(A. 29, 186, 305-329, 334-346). After the cancellation of those agreements, USL and Lavino refused to release containers to Houff. Houff lost substantial amounts of business because its customers reassigned their hauling work to truckers having USL and Lavino interchange agreements (A. 29, 30, 33-34, 186-187, 330-333).

In September 1974, Associated picked up eight FSL containers from USL at a Norfolk pier and stripped them at Associated's Virginia Beach terminal (A. 60-61). Associated had determined that one container was overloaded and that the rental of the others was a needless expense because Associated had available its own empty trailers (A. 61-62, 192-193). Pursuant to the Rules on Containers, USL was subsequently assessed $8000 in damages. When Associated refused to reimburse USL for that expense, USL cancelled its interchange agreement with Associated (A. 63, 195-198, 396-406). Associated, like Houff, lost a substantial amount of business as a result (A. 63-64, 197).

2. **The Board's Conclusions and Orders**

Based on these facts, the Board concluded that truckers and consolidators, not longshoremen, traditionally performed off-pier stripping and stuffing of containers. Accordingly, the Rules on Containers, which required performance at the pier by longshoremen of work traditionally performed by consolidators and truckers away from the pier, had a secondary objective forbidden by Section 8(e) of the Act. For

the same reason, ILA's efforts to enforce the Rules by imposing economic sanctions violated Section 8(b)(4)(B) of the Act.

In the *Dolphin* proceeding, the Board followed its decision in the *Conex* case,[19] which also involved the application of the Rules on Containers to LCL cargo in the Port of New York. In *Conex*, the Board concluded that (221 N.L.R.B. at 959-960) (footnote omitted):

> The traditional work of the longshoremen represented by ILA has been to load and unload ships. When necessary to perform their loading and unloading work, longshoremen have been required to stuff and strip containers on the piers.
>
> Similarly, for many years, maritime cargo has been sorted and consolidated off the docks by companies employing teamsters and unrepresented employees. With the advent of vessels designed exclusively to carry the large containers presently in use, these consolidating companies, such as Consolidated and Twin, have continued to consolidate shipments into containers prior to their placement aboard the vessels. The consolidators generate such work themselves, performing it not on behalf of the employer-members of NYSA but for their own customers who have goods to ship. Furthermore, they perform this consolidating work at their own off-pier premises, with their own employees who are outside the unit represented by ILA, and who fall within the

[19] *International Longshoremen's Association, AFL-CIO (Consolidated Express, Inc.)*, 221 N.L.R.B. 956 (1975), enforced, 537 F.2d 706 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977).



> coverage of separate collective-bargaining agreements, under which they are represented by other labor organizations. It is clear, therefore, that Consolidated and Twin have traditionally been engaged in the work of stuffing and stripping containers such as are here in controversy.
>
> From the foregoing and the record as a whole, it is clear that the on-pier stripping and stuffing work performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed by Consolidated and Twin at their own off-pier premises. It does not fall within ILA's traditional role to engage in make-work measures by insisting upon stripping and stuffing cargo merely because that cargo was originally containerized by nonunit personnel. Yet, ILA's demands here could only be met if the work traditionally performed off the pier by employees outside the longshoremen unit were taken over and performed at the pier by longshoremen represented by ILA.

Similarly, in *Associated Transport*, the Board adopted (Pet. App. 114a-115a) the following conclusions from the Administrative Law Judge's decision (Pet. App. 164a-166a):

> [T]he history of the longshoremen's work tradition in Baltimore and Hampton Roads shows that their role in handling break-bulk import cargo ended at the head of the pier, where the ILA freight handler picked up the cargo and loaded it onto a truck. Thereafter, the fate of that cargo was the responsibility of the motor carrier, as set forth in the bill of lading.

> The advent of containerization * * * did not change the traditional role of the ILA longshoremen. The motor carriers have treated import shippers' loads destined for consignees located more than 50 miles from the center of the port much as they did break-bulk cargo. For, with very rare exceptions, motor carriers have freely picked up the steamship company's containers mounted on wheeled trailers and hauled them to the consignee in accordance with the bills of lading [and have stripped those containers when necessary]. * * * [I]n the performance of contracts to haul cargo from a pier to the consignee, motor carriers have traditionally utilized their own employees whenever economy, safety, or government regulations required the stripping of the shipper's load destined to a consignee outside the 50-mile zone.
>
> From the foregoing and the record as a whole, I find that the traditional on-pier work of longshoremen has not included the work performed by the employees of motor carriers, [such] as Associated and Houff, at their off-pier facilities. [Under the Rules, however, truckers] would be obliged to assign this work to ILA labor at the pier. Indeed, in order to avoid the sanctions revealed in this case, motor carriers who might otherwise exercise their discretion to transfer cargo after leaving a CONASA-ILA pier would permit ILA labor to routinely strip all shippers' [loads] destined outside the 50-mile zone, and thus transform containers into cargo nets.

The Board therefore held that longshoremen in the Ports of Baltimore and Hampton Roads, as in *Conex*, "had *not* historically done the work" that the Rules



on Containers sought to obtain exclusively for them (Pet. App. 116a-117a).

Because the Rules on Containers sought to acquire work for ILA members that historically had not been performed by longshoremen, but instead had been performed by employees of consolidators and truckers, the Board held that the "work preservation" doctrine of *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612 (1967), did not immunize the Rules. In the absence of a valid work preservation objective, the Board concluded that the purpose of the Rules negotiated by ILA was to force steamship companies to cease doing business with consolidators and truckers who did not surrender their traditional work, in violation of Section 8(e) of the Act, 29 U.S.C. 158(e) (Pet. App. 97a, 166a). Similarly, by fining and imposing liquidated damages on the steamship companies under the Rules on Containers, ILA coerced the steamship companies to cease doing business with the consolidators and truckers, in violation of Section 8(b)(4)(B) of the Act, 29 U.S.C. 158(b)(4)(B) (Pet. App. 98a, 166a-167a). Accordingly, the Board ordered ILA and the employer organizations to cease giving effect to the Rules on Containers to the extent that they had been found to be unlawful (Pet. App. 98a-109a, 117a-118a, 168a-184a).

### 3. The Court of Appeals' Decision

A divided panel of the court of appeals refused to enforce the Board's orders, holding that the Rules on

Containers and the efforts of ILA to enforce them with economic sanctions constituted forms of "work preservation" privileged under *National Woodwork* (Pet. App. 44a-52a). The court was of the view that "the Board erred as a matter of law by ignoring traditional work patterns when defining the work in controversy" (Pet. App. 51a; footnote omitted). It stated that "[l]ongshoremen have historically loaded and unloaded ocean-borne cargo, which not only has meant loading the cargo into and out of the hold of the ship, but also has meant sorting the cargo and loading it on to equipment such as pallets." For this reason, the court concluded, "containerization merely represents a change in equipment." The court added that stuffing a container is substantially the same as loading a ship, and stripping a container is not "distinctly different from and unrelated to" sorting cargo discharged from a ship (Pet. App. 48a-50a).[20]

Judge Robb dissented, stating (Pet. App. 82a-83a):

> I am not impressed by the fiction that a container is part of the hold of a ship; if it is, then so is any large box in the hold of a ship. Nor am I persuaded by the "similarities" which the majority perceive between the work of loading and unloading ships and the work of filling and emptying containers. The question is not whether there may be similarities in the work entailed in the two operations. Rather, the question is, who traditionally has done that work.
>
> In my opinion the longshoremen are attempting to acquire work they have never had, therefore the defense of work preservation must be rejected. * * *

[20] The court also concluded that the employers subject to union pressure—the steamship companies—"controlled" the work in controversy within the meaning of *NLRB* v. *Enterprise Association of Pipefitters*, 429 U.S. 507 (1977). The court reasoned that the steamship companies "controlled the disposition of all the containers at issue" and "simply refused to supply their containers to the truckers and consolidators so that the Rules would be complied with * * *" (Pet. App. 56a-57a).



The full court, with four judges dissenting, denied the Board's petition for rehearing en banc (Pet. App. 87a-88a).

## SUMMARY OF ARGUMENT

### I.

The Rules on Containers, which obligate employer-steamship companies to cease doing business with consolidators and truckers who stuff and strip containers within 50 miles of the docks, fall within the literal prohibition of Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), which forbids "unions and employers to enter into collective bargaining contracts whereby the employer ceases or agrees to cease doing business with any other person." *NLRB* v. *Enterprise Association of Pipefitters*, 429 U.S. 507, 517 (1977). However, the decisions of this Court establish that only "secondary agreements" violate Section 8(e), not primary agreements having the purpose of preserving work traditionally performed by the contracting employees.

The question whether an agreement is a primary "work preservation" agreement, rather than an un-

lawful secondary agreement, depends upon whether, under "all the surrounding circumstances," the agreement was intended to preserve traditional unit work, or instead was "tactically calculated to satisfy union objectives elsewhere." *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 644 (1967).

In the present case the Board determined that, in light of all the surrounding circumstances, the union's objective was not to preserve work traditionally performed by its members but rather to enlarge its work opportunities by eliminating the off-pier loading and unloading historically performed by consolidators and truckers.

The Board determined that truckers and consolidators performed the work of handling cargo at inland terminals both before and after the advent of containerization. Longshoremen, by contrast, handled cargo only at the pier. Moreover, longshoremen and off-pier workers served different economic markets: longshoremen acted on behalf of steamship companies that employed them to load ships, while consolidators and truckers acted on behalf of shippers who employed them to serve their freight forwarding needs.

There is no doubt that containerization changed the way in which cargo moves from the pier to the ship, which is the traditional work of longshoremen. Containerization decreased the need for piecemeal cargo handling at the pier. However, longshoremen may not secure the off-pier work traditionally performed by other employees simply because improvements in



technology have changed the form in which cargo is conveyed. Because longshoremen have never loaded or unloaded cargo in the separate market served by consolidators and truckers, the Rules on Containers have the forbidden secondary objective of a "boycott to reach out to monopolize jobs or acquire new job tasks." *NLRB* v. *Enterprise Association of Pipefitters, supra*, 429 U.S. at 529 n.16.

Since the Rules on Containers do not serve a valid "work preservation" objective, but instead seek to enlarge work opportunities for longshoremen, it is immaterial that they promote the economic interests of longshoremen. It is also immaterial that they purport to represent a "reasoned response" to the "difficult problem of technological innovation" (Pet. App. 60a). As noted in *Pipefitters*, the parties cannot immunize secondary conduct by agreement. 429 U.S. at 520. Moreover, *Pipefitters* explicitly rejected the notion that workers "may legally demand that their employer cease doing business with another company even if the union's object is to obtain new work so long as that work is for the benefit of [the] employees." 429 U.S. at 529-530 n.16.

## II.

This Court held in *Pipefitters* that, in determining whether activity is tactically calculated to satisfy union objectives elsewhere, an important factor is whether the employer against whom the union brings pressure controls the work in controversy. In the present case, the employer-steamship companies did

not have control over the work in controversy. That work—stuffing and stripping containers at offshore terminals at the request of shippers—could be assigned only by the shippers themselves. Because the steamship companies lacked power to grant the union's ultimate demand, they could produce an advantage for the union only by acting as its ally in bringing pressure to bear on third parties (the consolidators and truckers). Here, as in *Pipefitters*, the union's effort to secure work that the employers with whom it had an agreement could not deliver signifies that the union's grievance was not with the employers but rather with other business firms and other workers performing off-pier consolidation and deconsolidation.

The fact that the steamship companies owned the containers withheld from consolidators and truckers does not mean that they controlled the work in controversy. Even if the steamship companies were entitled to withhold the containers (a proposition challenged in pending antitrust litigation), they could not give longshoremen the work that shippers previously awarded to truckers and consolidators.

### III.

This Court also noted in *Pipefitters* that, in applying the totality of the circumstances test to determine whether an agreement is aimed at businesses outside of the bargaining unit, it is necessary to consider the "economic context in which the dispute arose," and whether the agreement "could effectively foreclose [the boycotted business] and similar pro-



ducers from the market." 429 U.S. at 524 n.12. Evaluation of the impact of the agreement on persons outside the bargaining unit assists in determining whether it serves "union objectives elsewhere." *National Woodwork Manufacturers Association* v. *NLRB*, *supra*, 386 U.S. at 644.

The Rules on Containers have a direct and severe impact on consolidators and truckers who are denied access to containers essential to their business or who are required to pay large fines to continue to obtain containers. The Rules also deny shippers the benefit of the services performed by consolidators and truckers. This is illustrated by the so-called "make work" provision of the Rules, which requires that a load of cargo that already has been stuffed off the pier must be stripped and restuffed by longshoremen prior to loading. This unnecessary rehandling negates the very purpose of off-pier consolidation, which is designed to load the goods of shippers under controlled conditions, to containerize those goods for safe transport over land and sea, and to avoid the losses and delays resulting from piecemeal handling at the docks.

Rules with such a drastic impact on the separate market served by consolidators and truckers should not be sheltered under an expansive interpretation of the "work preservation" doctrine. The union used the Rules not as a shield, but as a sword to impair the business opportunities of third parties, the laborers whom they employ, and the members of the public who require their services to meet bona fide transportation needs.

IV.

The use of threats or coercion to enforce a secondary agreement violates Section 8(b)(4)(B) of the Act, 29 U.S.C. 158(b)(4)(B), which forbids union pressures that cause an employer to cease doing business with other persons. As the Board found in this case, the object of the liquidated damage penalties assessed against the steamship companies for transporting containers stuffed and stripped by consolidators and truckers was to force the steamship companies to cease doing business with them. Because, as we have noted, these sanctions were utilized to enlarge rather than preserve traditional work opportunities and were directed toward employers who did not have the right to award the work in controversy, they constituted coercive measures prohibited by Section 8(b)(4)(B).

## ARGUMENT

### I. THE RULES ON CONTAINERS VIOLATE SECTION 8(e) OF THE ACT BECAUSE THEY ENLARGE, RATHER THAN PRESERVE, WORK OPPORTUNITIES FOR LONGSHOREMEN

Section 8(e) makes it an unfair labor practice "for unions and employers to enter into collective-bargaining contracts whereby the employer ceases or agrees to cease doing business with any other person." *NLRB* v. *Enterprise Association of Pipefitters*, 429 U.S. 507, 517 (1977).[21] However, Section 8(e) pro-

[21] Respondents have not sought to defend the Rules on Containers on the ground that they do not constitute an agreement to cease doing business. As previously noted, the Rules, as supplemented and clarified, require that longshoremen must perform all stripping and stuffing of LCL and FSL containers within a 50-mile radius of the docks. See Rules 1(a), 2(B)(4), App., *infra*, 3a, 4a, 6a. The Rules expressly provide that the contracting parties must cease supplying containers to outsiders who stuff and strip containers: "No carrier or direct employer shall supply its containers to any consolidator or deconsolidator." Rule 1(e), App., *infra*, 4a. They further provide, under the heading "No Avoidance or Evasion," that "[a]ny facility operated in violation of the Container Rules will not have service supplied to it by any direct employer and the ILA will not supply labor to such facility." Rule 7(d); App., *infra*, 8a. The Rules also apply to consolidating and trucking companies that seek to "evade" the boycott provisions by moving their businesses outside of the 50-mile limit. See Rule 7(a); App., *infra*, 7a. Moreover, even if the agreement did not expressly require cessation of business (as the Rules on Containers clearly do), it would nonetheless violate Section 8(e) if it so severely burdened a business relationship that it had as its natural consequence either a change in the method of doing business or the cessation of business dealings altogether. See, *e.g.*, *Danielson* v. *International Organization of Masters, Mates & Pilots*, 521 F.2d 747, 753-754 n.7 (2d Cir. 1975); *Humphrey* v. *International Longshoremen's Association*, 548 F.2d 494, 497 n.14 (4th Cir. 1977) (construing earlier version of Rules on Containers).



hibits only "agreements having 'secondary' objectives"; it "does not prohibit agreements for 'primary' purposes, including the purpose of preserving for the contracting employees themselves work traditionally done by them." *Ibid.* See also *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 620, 635 (1967).

Whether an agreement obligating an employer to cease doing business with another person is primary or secondary depends upon "whether, under all the

surrounding circumstances, the Union's objective was preservation of work for [the unit] employees, or whether the agreement[] * * * [was] tactically calculated to satisfy union objectives elsewhere." *National Woodwork Manufacturers Association* v. *NLRB, supra,* 386 U.S. at 644 (footnote omitted). If an agreement has the former objective, it is primary and lawful; if it has the latter objective, it is secondary and unlawful. An agreement that seeks to preserve for employees in the bargaining unit work that they have traditionally performed is primary, if the employer has control over the work and thus can continue to award it. Such an agreement serves the lawful purpose of protecting the jobs of unit employees. 386 U.S. at 646. See also *NLRB* v. *Enterprise Association of Pipefitters, supra,* 429 U.S. at 529-531. On the other hand, an agreement that seeks to acquire new work is secondary because it goes beyond the lawful purpose of protecting the work of the bargaining unit and directly impairs the interests of other employers.[22]

The determination of which side of the line an agreement falls on is to be made by the Board in

[22] As the court observed in *Pipefitters*: if the union had sought to acquire new work, "the union's object would necessarily be to force [the employer] to cease doing business with [the boycotted party], not to preserve, but to aggrandize, its own position and that of its members. Such activity is squarely within the statute" (429 U.S. at 530 n.16). See *National Woodwork Manufacturers Association* v. *NLRB, supra,* 386 U.S. at 630-631; see also *id.* at 648 (Harlan, J., concurring).



the first instance. As noted in *Pipefitters,* the Board must consider all the surrounding circumstances, including "the history * * * of the relevant * * * work traditionally done" by the employees, "the actual conditions in the * * * market," and whether the union seeks "to obtain work that the employer has no power to assign." 429 U.S. at 521, 523, 524 n.12.[23] Judicial review of the Board's determination is limited. As this Court emphasized in *Pipefitters,* the "Board may assign to the presence or absence [of one or more of these factors] much more weight than would the Court of Appeals, but this far from demonstrates a departure from the totality-of-the-circumstances test recognized in *National Woodwork.*" 429 U.S. at 524 (footnote omitted). The court of appeals is not empowered to "reweigh[] the facts" or to overturn the Board's decision because the court "would [not] have arrived at the same result as the Board did * * *." *Id.* at 531-532.

After considering the totality of the circumstances in the present cases, the Board reasonably concluded that consolidating companies and truckers, rather than longshoremen, traditionally performed off-pier stuffing and stripping of containers. Accordingly, insofar as the Rules on Containers sought to acquire

[23] In *National Woodwork,* the Court noted the relevance of factors such as "the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry." 386 U.S. at 644 n.38.

this work for longshoremen by obligating their employers to cease doing business with consolidating companies and truckers, they violated Section 8(e) of the Act. In these circumstances, as in *Pipefitters*, the court of appeals erred by "substitut[ing] its own views of the facts for those of the Board." 429 U.S. at 532.

### A. The Work in Controversy Traditionally Has Been Performed by the Employees of Truckers and Consolidators, Not Longshoremen

1. The Board's decisions in these cases rest on its findings indicating that historically two separate and distinct consolidating and deconsolidating markets have developed in the shipping industry. One market consists of work generated by shippers who transport their cargo directly to the pier for handling by steamship lines. Longshoremen traditionally have performed this work. The other market consists of work generated by shippers who, instead of sending their cargo directly to the pier, employ the services of middlemen, such as consolidators and truckers, to forward and oversee the transportation of cargo.

Thus, as the Board found (see pages 4-5, 7-9, 12-16, *supra*), prior to the advent of containerization, shippers utilized the services of middlemen such as consolidators to handle their transportation needs. Shippers sent small cargo loads to off-pier facilities of consolidators or freight forwarders where the cargoes were combined with those of other shippers and trucked to the pier for handling by longshoremen.



With the advent of containerization, the consolidators began, as part of their business, to consolidate these shipments into containers prior to delivery to the pier.[24] Similarly, prior to containerization, a shipper with a truckload of goods could contract with a trucker to transport his goods on the trucker's bill of lading directly to the pier. After the introduction of containers, a shipper with a full container load of cargo could arrange for a trucker to haul his container to and from the pier, where longshoremen handled it without stripping and restuffing.

Although the court of appeals characterized containerization as a mere "equipment" change that altered the way ships are loaded (Pet. App. 48a-49a), the so-called "container revolution" accomplished much more than this. The handling of loose cargo "involve[s] a series of separate movements, broken by costly parcel-by-parcel transfer of cargo from one mode of transportation to the next."[25] Containerization provides the shipper with important new transportation options. A shipper can obtain "significant savings in transit time, freight charges, packing, insurance and pilferage losses if the LCL shipment is delivered to [a consolidator] at an inland depot for

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[24] During the same period, longshoremen also performed consolidation work, but only on behalf of customers of steamship companies who sent their shipments directly to the pier.

[25] Note, *Containerization and Intermodal Service in Ocean Shipping*, 21 Stan. L. Rev. 1077 (1969).

consolidation with other LCL traffic."[26] An FSL shipper using containers may avoid all rehandling of cargo. "With the advent of containerization, cargo moves in successive hauls by land, ocean or air, and land carrier without rehandling. Freight may be loaded into containers at inland origins and remain untouched throughout the journey until the containers arrive at inland destinations." Schmeltzer & Peavey, *Prospects and Problems of the Container Revolution*, 1 J. Mar. L. & Com. 203, 211 (1970). "Containers compatible for use by different modes of transportation minimize the cost of transferring cargo between transportation modes—an expense that * * * cuts deep into the savings of efficient intermodal combinations of carriers." Comment, *Intermodal Transportation and the Freight Forwarder*, *supra*, 76 Yale L.J. at 1365.

Of course, containerization changes the way in which cargo is moved from the pier to the ship—the traditional work of longshoremen. Prior to containerization, longshoremen handled loose cargo delivered to the pier on a piece-by-piece basis. Containerization markedly decreased the need for cargo handling at the pier by longshoremen (A. 115, 118, 150, 212, 214, 464). However, the Board properly concluded that the ILA's effort to compensate for that loss by seek-

[26] Ullman, *The Role of the American Ocean Freight Forwarder in Intermodal, Containerized Transportation*, 2 J. Mar. L. & Com. 625, 628 (1971). See also Schmeltzer & Peavey, *Prospects and Problems of the Container Revolution*, 1 J. Mar. L. & Com. 203, 206-210 (1970).



ing to acquire the work involved in preparing cargo for delivery to the pier, and in unloading cargo after it left the pier, was not lawful "work preservation," but rather an unlawful attempt to acquire new work for longshoremen that consolidators and truckers previously had performed.

2. Contrary to the conclusion of the court of appeals (Pet. App. 47a), the Board defined the relevant category of work "based on work patterns both prior to and subsequent to the innovation." It did not merely consider the work patterns that resulted from the adoption of the innovation. As shown above, prior to containerization, freight consolidators and truckers performed the service of collecting shippers' cargo and transporting it to the pier for carriage on a particular vessel. After the advent of containerization, off-pier consolidating and deconsolidating of cargo became part of that process. Longshoremen, by contrast, have handled cargo only at the pier, both before and after the introduction of containers.

Section 8(e) would not prohibit longshoremen from negotiating agreements preserving pier-side work, even though methods for performing that work had changed due to technological advances. Thus, an agreement providing that steamship lines could not subcontract the work of consolidating loose cargo sent to the pier would not violate Section 8(e). This would be analogous to *National Woodwork*. There, the employees represented by the union had traditionally finished blank doors for their employer at the job site. Their collective bargaining agreement provided

that they would not be required to handle prefinished doors. When the employer—who was free, under his contract with the project owner, to decide unilaterally whether or not to use prefinished doors—ordered such doors, the employees refused to install them. The Court concluded in *National Woodwork* that this refusal was primary activity not prohibited by Section 8(e), even though use of the technological innovation of prefabricated doors would have been more economical for the employer. The agreement in question sought no more than preservation of work traditionally performed at the job site.

In contrast, the Rules on Containers violate Section 8(e) because they seek to acquire for longshoremen the stripping and stuffing of containers of shippers who have chosen not to send their loose cargo directly to the pier, but rather to use the services of off-pier consolidators or truckers. Because longshoremen did not handle cargo in this market prior to containerization, the Rules on Containers have the forbidden secondary objective of a "boycott to reach out to monopolize jobs or acquire new job tasks." *NLRB* v. *Enterprise Association of Pipefitters, supra,* 429 U.S. at 529 n.16; *Humphrey* v. *International Longshoremen's Association,* 548 F.2d 494, 498-499 (4th Cir. 1977); *International Longshoremen's Association* v. *NLRB,* 537 F.2d 706, 711-712 (2d Cir. 1976); *International Longshoremen's Association* v. *NLRB,* 560 F.2d 439, 447 (1st Cir. 1977); see also *Associated General Contractors of California* v. *NLRB,* 514 F.2d 433, 438 (9th Cir. 1975).



In short, it is the court below, not the Board, which failed to look at "all the surrounding circumstances" as required by *National Woodwork* and *Pipefitters.* The court apparently reasoned as follows (Pet. App. 46a-52a): before containerization, longshoremen loaded cargo into ships piece-by-piece; after containerization, cargo is loaded into containers that are similar to the holds of ships; therefore, longshoremen are entitled to load containers. But as we have shown, containerization did not merely change the method of loading ships (A. 129). Containers changed the whole system of freight forwarding from the originating consignor to the ultimate consignee. Moreover, for present purposes, a container is not properly viewed as the equivalent of the hold of a ship. It is a special receptacle designed for safe transportation over both land and sea, which avoids repeated handling of cargo and the attendant dangers of theft, loss, and misrouting. Its benefits are maximized by controlled loading and unloading at inland facilities. In these circumstances, the Board could reasonably find that the work in controversy is not the loading of ships. Rather, it is the distinct part of intermodal transportation affected by containerization—the inland handling of cargo—in which longshoremen have never engaged.

3. Contrary to the suggestion of the court of appeals (Pet. App. 50a), the Board's analysis does not conflict with *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249 (1977). *Caputo* held that container stuffing and stripping, performed at or near the

pier, constitutes maritime employment under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, and that injuries sustained in the course of such work are compensable under the Act. The Court so concluded because it found that modern cargo handling techniques had moved much of the longshoremen's work from the ship to the shoreline, and that, in recognition of this fact, Congress had intended the Act to apply to tasks performed on the waterfront, including "the handling of cargo as it moves between sea and land transportation after its immediate unloading" (432 U.S. at 267). See also *P.C. Pfeiffer, Inc.* v. *Diverson Ford*, No. 78-425 (Nov. 27, 1979), slip op. 12-13.

However, as noted above, the fact that longshoremen perform some stuffing and stripping work does not mean that they traditionally performed all such work. In particular, a past practice of stripping and stuffing containers at the pier at the direction of steamship owners is not equivalent to stripping and stuffing containers at inland facilities at the direction of shippers. As the Court noted in *Caputo*, stuffing and stripping "may be done at the waterfront or inland" (432 U.S. at 253 n.2).[27] Respondents are not entitled to prevail in this case unless they can establish a claim to both pier-side and inland stripping and stuffing, whereas the injured parties in the compensation cases were entitled to prevail by showing that pier-side stripping and stuffing was sufficiently linked to maritime commerce.[28]

[27] The stuffing and stripping in *Caputo* was done at the pier, at the request of the longshoremen's own employers (432 U.S. at 253). This is traditional longshoremen's work.



### B. The Rules On Containers Have A Secondary Objective Even Though They Seek To Secure Economic Benefits For Longshoremen

Contrary to the view of the court of appeals (Pet. App. 53a-54a), the Rules on Containers do not have a lawful "primary" objective simply because they are "directly traceable to the collective bargaining relationship between the [employers] and the ILA and to the efforts of the parties * * * to adjust to an extremely thorny industrial issue: technological innovation versus job security." Moreover, it is no defense to the charge of violating Section 8(e) that the ILA lacked an intention to organize the "labor relations of the trucking companies and the consolidators" (*ibid.*). As held in *Pipefitters*, the mere fact that an agreement has been negotiated between a union and an employer and bestows benefits on the employees covered by the agreement does not render the agreement primary and lawful. As the Court explained:

[28] The test under the Longshoremen's Act—relationship to maritime commerce based on status and situs—has no similarity to the test here, which is whether the employee unit has a traditional claim to perform the work in controversy. We note that it would make no difference under the Longshoremen's Act whether the ILA-represented unit or some other unit had traditionally performed the stuffing and stripping work in question. As the Court noted in *P.C. Pfeiffer, Inc.* v. *Diverson Ford*, No. 78-425 (Nov. 27, 1979), "the scope of maritime employment [does not] depend on the vagaries of union jurisdiction." Slip op. 13.

"The distinction between primary and secondary activity does not always turn on which group of employees the union seeks to benefit * * * a union's efforts to influence the conduct of the nonstruck employer are not rendered primary simply because it seeks to benefit the employees of the struck employer." 429 U.S. at 529 n.16. *Pipefitters* explicitly rejected the notion that "workers may legally demand that their employer cease doing business with another company even if the union's object is to obtain new work so long as that work is for the benefit of [the] employees." *Id.* at 529-530 n.16.

Likewise, an agreement requiring an employer to cease doing business with another firm in order to enlarge job opportunities of the union has a forbidden secondary objective even though the union does not seek to organize the work force of the boycotted firm. As the Court explained in *Pipefitters* (quoting from *National Woodwork*) (429 U.S. at 529 n.16):

> [t]here need not be an actual dispute with the boycotted employer, here [the consolidators and truckers], for the activity to fall within [the secondary] category, so long as the tactical object of the agreement and its maintenance is that employer * * *.

In sum, because the Rules on Containers sought to force the steamship companies to cease doing business with consolidators and truckers, "not to preserve but to aggrandize" the position of ILA and its members (429 U.S. at 530 n.16), it follows that the consolidators and truckers were the "tactical object of



the agreement" even though the agreement yielded economic benefits to ILA's members. See 429 U.S. at 530-531 nn.17-18; *NLRB* v. *Denver Building Council*, 341 U.S. 675, 689 (1951); *International Brotherhood of Electrical Workers* v. *NLRB*, 341 U.S. 694, 700 (1951). The agreement did not seek to preserve traditional job tasks within the unit; rather, its object was to eliminate the performance of traditional job tasks elsewhere.

This conclusion is reinforced, as we demonstrate below, by the fact that the steamship lines—the longshoremen's employers—lacked control over the work in controversy and could not award it to the longshoremen. Thus, it is evident that the object of the agreement was not to secure the work from the employers, who could not give it, but rather to foreclose the business opportunities of the truckers and consolidators.[29]

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[29] If, as we submit, the Board correctly found that the Rules on Containers violate the secondary boycott provisions of the Act, then the court of appeals' observation that the Rules "represent a reasoned response to the difficult problem of technological innovation" (Pet. App. 60a) is irrelevant. The parties by agreement cannot immunize conduct that is proscribed by statute. "The substantial question * * * is whether, with or without the collective-bargaining contract, the union's conduct at the time that it occurred was proscribed secondary activity * * *. If it was, the collective-bargaining provision does not save it." *NLRB* v. *Enterprise Association of Pipefitters, supra*, 429 U.S. at 520.

### C. Because The Steamship Lines Do Not Control The Work In Controversy, The Union's Agreement With Them To Obtain That Work Necessarily Has The Objective Of Affecting The Business Activities Of Other Persons

In *Pipefitters*, this Court upheld the Board's position that, in determining whether union activity is "tactically calculated to satisfy union objectives elsewhere" (429 U.S. at 522)—and therefore secondary —a critical factor is whether the employer against whom the union brings pressure controls the work at issue. *Id.* at 524-528. The facts in *Pipefitters* are strikingly similar to those presented here. There, the union had a contract with Hudik that required Hudik's employees, who were represented by the union, to perform cutting and threading of pipe on the jobsite. Austin, the project engineer, specified that climate control units manufactured by Slant/Fin, which had factory-installed internal piping, must be used on the construction project. When Hudik's employees refused to handle the prepiped units specified by Austin, the Board found, and this Court agreed, that such conduct had an unlawful secondary object of forcing a change in Austin's choice of product. As the Court explained (429 U.S. at 530 n.16):

> Here, * * * the union * * * sought to acquire work that it never had and that its employer had no power to give it, namely, the piping work on units specified by any contractor or developer who prefers and uses prepiped units. By seeking the work at the Norwegian Home, the union's tactical objects necessarily included influencing Austin; this conduct falls squarely within the statement of *National Woodwork* that a union's activity is secondary if its tactical object is to influence the boycotted employer.



Similarly, in the present case, the union negotiated an agreement with the employer steamship lines which provides that all consolidation of LCL cargo and all stripping of FSL cargo within 50 miles of the docks must be performed by longshoremen. This agreement promises more than the steamship companies can give. The shippers of LCL cargo contracted with Dolphin and San Juan to have their consolidation work performed off-pier. Similarly, the shippers of FSL cargo contracted with Associated and Houff to transport their cargo and left it to the truckers to determine how to handle that cargo after pick-up. The steamship lines had no right to award to longshoremen the stuffing and stripping work performed by these consolidators and truckers. Accordingly, insofar as the Rules on Containers sought to acquire this work for longshoremen, they necessarily had as a "tactical object" the pressuring of consolidators and truckers to change their method of doing business or to cease doing business altogether.[30]

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[30] In simple terms, the union's grievance was not with the employer steamship companies, who could not satisfy their demands, but rather with third parties outside of the bargaining unit. As the Board noted in its brief in this Court in the *Pipefitters* case, No. 75-777 (Br. 27), agreements such as the Rules on Containers have a secondary object because they are "exerted against a firm that lacked power to grant the union's ultimate demand, and that could produce advantage

The court of appeals nonetheless concluded (Pet. App. 56) that the Board's "posture in the cases before us is not supported by rational application of the right to control test," reasoning that the steamship lines in fact "controlled the disposition of all the containers at issue." Once again, however, the court has misapprehended the work in controversy. Control over the disposition of containers is not tantamount to control over the work in controversy.[31] As we have

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for the union only by acting as the union's ally in bringing pressure upon a third party, by inducing a change in the business of that third party or by ceasing to do business with it." See also *NLRB* v. *Denver Building Council, supra,* 341 U.S. at 692; *International Longshoremen's Association* v. *NLRB,* 560 F.2d 439, 446-447 (1st Cir. 1977).

[31] We also note that the steamship companies may not, in fact, have a legal right to withhold containers pursuant to the Rules on Containers. The Rules have been challenged as giving rise to an illegal boycott under the antitrust laws (see *International Longshoremen's Association* v. *Consolidated Express,* petition for cert. pending, No. 78-1902). The Rules have also been challenged under the Shipping Act of 1916, 46 U.S.C. 801 *et seq.*, and the Intercoastal Shipping Act of 1933, 46 U.S.C. 843 *et seq.* (see *Sea-Land Service, Inc., and Gulf Puerto Rico Lines* (No. 73-17), and *Puerto Rico Maritime Shipping Authority—Proposed ILA Rules on Containers* (No. 74-40) (FMC June 14, 1978), review pending, No. 78-1776 (D.C. Cir.)). In that case, the FMC held, *inter alia,* that water carrier tariff provisions requiring restuffing pursuant to the Rules on Containers were unjustly discriminatory. As the Administrative Law Judge explained in that proceeding (Oct. 9, 1975 decision, slip op. 33-34):

> when the ocean transportation service * * * is the same for two exporters who each ship 20 identical packages of the same commodity, to permit the first of these two exporters to have his container moved promptly and freely across the pier [because it has been stuffed outside the 50 mile radius prescribed under the Rules on Containers], and at the same time to require the second exporter to have his container delayed, stripped and restuffed or to require him to deliver his 20 packages loose to the pier [because it has been stuffed within the 50 mile radius] obviously restricts the freedom of choice of the second exporter and results in unfair and unjust discrimination against the second exporter.



shown above (pages 34-39), the disputed work is the stuffing and stripping of containers at inland facilities for shippers who choose not to have their cargo handled in loose form at the pier. Refusal to supply containers is only a sanction chosen by the union and the steamship companies to enforce the Rules on Containers and to effectuate the boycott of the consolidators and truckers. That refusal could not, of course, alter the fact that it is the shippers —and the shippers alone—who have the right to enter into contracts for the transportation of their goods. When a shipper selects an off-pier consolidator or trucker to avoid piecemeal handling of his goods at the pier (with the attendant risk of loss, theft or misrouting), his right to so contract is impaired by the union's insistence on "make-work measures [such as] stripping and stuffing cargo merely because that cargo was originally containerized by non-unit personnel." *Conex, supra,* 221 N.L.R.B. at 960.[32]

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[32] As the Administrative Law Judge explained in *Sea Land Service, Inc., supra,* slip op. 5:

> Needless to say, a shipper, who already has gone to the expense of stuffing a container at a point away from the waterfront facilities, is not happy to be faced with the

It follows from the foregoing that the "work preservation" tactics employed in this case are fundamentally different from those considered in *National Woodwork Manufacturers Association* v. *NLRB*, *supra*. As previously noted, the contractor in *National Woodwork* exercised complete discretion to use finished or unfinished materials at the job site. The persons who contracted for his services did not specify which materials must be used. Accordingly, enforcement of an agreement between the union and the contractor to use unfinished materials, and thereby preserve the work traditionally performed by union members at the job site, had a primary objective. The employer could satisfy the union's demand without infringing the contractual rights of other persons (386 U.S. at 616). In the present case, in contrast, the Rules on Containers call for pier-side stuffing and stripping in contravention of the right of shippers to contract with freight forwarders for

additional PRMSA transfer charge for the stripping of that container and the restuffing of the contents by the ILA at the waterfront facilities, before the cargo is ocean-borne to Puerto Rico.

If the shipper, forwarder, or consolidator chooses not to be subjected to the $1000 penalty by incurring the extra expense (transfer charge) for the second handling of the contents of his container before it is ocean-borne, said shipper also would be concerned with possible delays, losses, or damages related to the second handling. Of course, under ideal circumstances, the shipper wants his cargo stuffed only once and he does not want to be subjected to any penalties for "evading" a second handling of his cargo.



inland cargo handling that meets their special transportation needs.[33]

## II. THE RULES ON CONTAINERS PRECLUDE STEAMSHIP LINES FROM DOING BUSINESS WITH CONSOLIDATORS AND TRUCKERS AND EFFECTIVELY DEPRIVE SHIPPERS OF THEIR SERVICES

In *Pipefitters*, this Court explained that one relevant element under the "totality of the circumstances test" is the "economic context in which the dispute arose." The Court also noted the significance of the fact that the agreement there in question "could effectively foreclose [the boycotted manufacturer] and similar producers from the market." 429 U.S. at 524 n.12. In short, the incidence of economic sanctions imposed by a challenged agreement is relevant in ascertaining whether the agreement serves "union ob-

[33] In *National Woodwork*, the Board distinguished the situation of a contractor who controlled the work in controversy (Frouge) and that of other contractors who did not. See 386 U.S. at 616-617 n.3. As the Board explained in its brief in this Court in *National Woodwork*, No. 110 (Br. 18, 20): "Frouge * * * was able to grant the Union's demand for more work without disrupting contractual relations with other persons; consequently there was no basis for concluding that the work stoppage involving his employees was directed at anyone other than Frouge. * * * * * [This] was not within the power of the other three contractors, since their contracts with the project owners effectively removed the assignment of the particular work from the ambit of their control. Permitting the Union to rely upon the work preservation clause in the latter case necessarily would have had direct effects on those outside the employer-union relationship." As previously noted, this Court upheld the Board's control analysis in *Pipefitters*.

jectives elsewhere." *National Woodwork Manufacturers Association* v. *NLRB*, *supra*, 386 U.S. at 644.[34]

There can be little doubt that the Rules on Containers, as enforced in these cases, compel shippers to forego the benefits of services of consolidators and truckers whose terminals are located within 50 miles of the piers. They also impose severe economic disabilities on consolidators and truckers who do not use ILA labor. Rule 1(a) (App., *infra*, 3a) requires that a load of LCL cargo, which has already been stuffed into a container that is "owned, leased or used" by the steamship company, must be stripped from that container at the pier by "deepsea ILA labor" and restuffed into another container prior to loading aboard ship (A. 531-533). This is the so-called "make work" provision. If such a container is not stripped at the pier, a $1000 penalty is imposed against the steamship company that transports the cargo (see Rule 7(c), App., *infra*, 8a). As previously noted (see pages 18-19, 47-48 note 32 *supra*), these penalties are often passed on to freight forwarders. Such penalties can only be avoided by using ILA labor to stuff goods at the pier. This, of course, would require repetitive loading of the cargo inland and at the pier.

Similarly, recipients of import FSL cargo who choose truckers to haul containers are, in effect, required to pick up all of their cargo loose at the pier,

[34] See also 386 U.S. at 644 n.38, noting the relevance of the "economic personality of the industry" in applying the "totality of the circumstances" test.



or to choose a trucker who will agree in advance never to strip the cargo within 50 miles of the docks, whatever the necessity for doing so. The Rules require that stripping be performed only at the pier by ILA labor; they characterize any trucker who attempts to strip cargo as a "deconsolidator." Such a trucker is denied access to containers (see Rules 1(a)(3), 1(e), and 7(d), App., *infra*, 4a-5a, 8a). In practice, since truckers strip some but not all FSL containers, steamship companies must cease doing *all* business with any trucker who they suspect strips cargos to avoid being fined on those occasions when the trucker does in fact strip cargoes at his terminal (A. 19, 106, 124-125, 165).

As shown above, enforcement of the Rules against San Juan and Dolphin resulted in a refusal to rent them containers needed to conduct their business. This, in turn, denied shipping customers access to consolidation services previously afforded by San Juan and Dolphin. Many of these shippers would then have no practical choice but to send their goods in loose form to the pier in the future if they wished to make use of containers—a result that negates the very purpose of containerized transportation.

Similarly, the Rules on Containers compel truckers like Associated and Houff, who might otherwise exercise their business discretion to strip FSL cargoes when needed to achieve safe and economical transport, to permit ILA labor to routinely strip FSL cargo to be hauled for their customers. Only in this way could the truckers avoid imposition of liquidated

damages and cancellation of their interchange agreements that would result if the necessity arose to strip the cargo away from the pier. Again, this defeats the purpose of the shipper in selecting a trucker to handle containerized FSL cargo and in authorizing the trucker to exercise discretion to strip containers when necessary to reduce shipping costs or avoid dangerous transportation conditions.

Rules with such a drastic impact on the separate market served by consolidators and truckers are more than a "shield" to preserve the jobs of ILA-represented longshoremen. Rather, they are a "sword" used to monopolize the work of stuffing and stripping containers. See *National Woodwork Manufacturers Association* v. *NLRB*, *supra*, 386 U.S. at 630, citing *Allen Bradley Co.* v. *Local Union, No. 3, Electrical Workers*, 325 U.S. 797 (1945). The "work preservation" doctrine was not intended to shelter the disruptive secondary impact of the Rules on the contractual rights of shippers and freight forwarders or the wastefulness of their "make work" requirements.[35]

[35] Cf. *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 623 (1975). As Congress declared in the National Productivity and Quality of Working Life Act of 1975, 15 U.S.C. 2401 *et seq.*, "it is the continuing policy of the Federal Government * * * to stimulate a high rate of productivity growth." 15 U.S.C. 2403(a). The Act provides that the "laws * * * of the United States shall be so interpreted as to give full force and effect to this policy." 15 U.S.C. 2403(c). The Act affirms repeatedly that "there is a national need to identify and encourage appropriate application of technology in all sectors of American economic



We emphasize in this connection that this is not a case in which two employee groups are disputing who will perform the same work. If the contention of the longshoremen is accepted, the "work" or service of off-pier consolidation, as performed by local NVOCCs such as San Juan and Dolphin, will substantially disappear. With it will go the benefits of container technology that permit their customers to load cargoes only once at the inland point of departure, without rehandling at the docks of the domestic and foreign ports.

In an effort to confine the scope of its holding, the court of appeals asserted that it would not permit "longshoremen [to] literally chase containers around the country, demanding the right to stuff and strip them" (Pet. App. 51a n.177). It added that "[o]ur decision does not radiate beyond the Rules on Containers, which are restricted in terms to a 50-mile area around each port" (*ibid.*). But the court's attempted limitation of the reach of its decision conflicts with the rationale for that decision. If, as the court believed, a container is the "functional equivalent" of a wooden pallet or cargo net and has replaced the longshoremen's traditional work of loading loose

activity in order to improve productivity." 15 U.S.C. 2401(11). See also 15 U.S.C. 2401(1)-(4), (13), (15). The Act contemplates employee adjustment to technological innovation by techniques such as retraining and worker assistance, not by secondary boycotts that eliminate new technologies that are essential to productivity and full employment nationwide. See 15 U.S.C. 2401(14); F. Scherer, *Industrial Market Structure and Economic Performance* 346-347 (1970); see also Pet. App. 5a ("Containerization * * * engendered huge increases in dockside productivity.").

cargo into ships, then it logically follows that it would be lawful primary activity for longshoremen to seek to preserve their "traditional work" wherever it was being done. Nothing in the court's reasoning would preclude the parties from altering the scope of the Rules to include a wider geographic area than the present 50-mile radius, or indeed, to cover all containerization work.[36]

We also note that the court's attempted limitation of its decision offers cold comfort to the consolidators and truckers who complained to the Board. Rule 7(a) of the Rules on Containers (App., *infra*, 7a) specifies that consolidators or truckers currently operating within the 50-mile zone cannot move beyond that perimeter to "evade" the boycott imposed by the Rules (A. 18-20, 41, 92-93, 226. See *Conex*, *supra*, 221 N.L.R.B. at 960).

## III. COERCIVE MEASURES TO ENFORCE THE RULES ON CONTAINERS VIOLATE SECTION 8(b)(4)(B) OF THE ACT

The use of threats or coercion to enforce an agreement with secondary objectives violative of Section 8(e) is unlawful under Section 8(b)(4)(B) of the Act, 29 U.S.C. 158(b)(4)(B). See *NLRB* v. *Enterprise Association of Pipefitters*, *supra*, 429 U.S. at 520-522 & n.8, 528-532 (1977); *Local Union No. 98, Sheet Metal Workers* v. *NLRB*, 433 F.2d 1189, 1196-

[36] The inland packing of large boxes or crates could also be viewed as the "functional equivalent" of loading a ship if those crates contained goods that previously were transported overseas in smaller receptacles. See Pet. App. 82a (Robb, J., dissenting).



1197 (D.C. Cir. 1970). As the Board expressly found (Pet. App. 98a, 166a-167a), the liquidated damage penalties assessed against TTT and MTM for handling containers stuffed by Dolphin and San Juan (see page 13, *supra*), threatened, restrained and coerced those employers to cease doing business with Dolphin and San Juan. Similarly, the liquidated damages assessed against Lavino and USL for handling containers stripped by Houff and Associated (see pages 18-19, *supra*), coerced those employers into cancelling their equipment interchange agreements with the truckers. See *Associated General Contractors of California* v. *NLRB*, 514 F.2d 433, 438-439 (9th Cir. 1975); *Carrier Air Conditioning Co.* v. *NLRB*, 547 F.2d 1178, 1192 (2d Cir. 1976), cert. denied, 431 U.S. 974 (1977); *Acco Construction Equipment, Inc.* v. *NLRB*, 511 F.2d 848, 852 (9th Cir. 1975).

Thus, if, as we contend, the Rules on Containers constitute a secondary agreement in violation of the Act, it follows that ILA pressure to enforce them violated Section 8(b)(4)(B) of the Act.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

LAWRENCE G. WALLACE
*Deputy Solicitor General*

STEPHEN M. SHAPIRO
*Assistant to the Solicitor General*

WILLIAM A. LUBBERS
*General Counsel*

JOHN E. HIGGINS, JR.
*Deputy General Counsel*

ROBERT E. ALLEN
*Acting Associate General Counsel*

NORTON J. COME
*Deputy Associate General Counsel*

LINDA SHER
*Assistant General Counsel*

HOWARD E. PERLSTEIN
*Attorney*
*National Labor Relations Board*

MARCH 1980



## APPENDIX

## CONASA-ILA RULES ON CONTAINERS

(As clarified and reinstated by Supplemental Agreement of May 30, 1975)

### PREAMBLE

This Agreement made and entered into by and between the carrier and direct employer members of the CONASA Port Associations (hereinafter referred to collectively as "CONASA") and the International Longshoremen's Association, AFL-CIO ("ILA"), its Atlantic Coast District ("ACD") and its affiliated local unions in each CONASA port ("locals") covers all container work at a waterfront facility which includes but is not limited to the receiving and delivery of cargo, the loading and discharging of said cargo into and out of containers, the maintenance of containers, and the loading and discharging of containers on and off ships.

CONASA agrees that it will not directly perform work done on a container waterfront facility (as hereinafter defined) or contract out such work which historically and regularly has been & currently is performed by employees covered by CONASA-ILA Agreements, including CONASA-ILA craft agreements, unless such work on such container waterfront facility is performed by employees covered by CONASA-ILA Agreements.

## RULES

The following provisions are intended to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts which was performed at deepsea waterfront facilities. These rules do not have any effect on work which historically was not performed at a waterfront facility by deepsea ILA labor. To assure compliance with the collective bargaining provisions, the following rules and regulations shall be applied uniformly in all CONASA Ports to all import or export cargo in containers:

Definitions

(a) Loading a Container

—means the act of placing cargo into a container.

(b) Discharging a Container

—means the act of removing cargo from a container.

(c) Loading Containers on a vessel

—means the act of placing containers aboard a vessel.

(d) Discharging Containers from a vessel

—means the act of removing containers from a vessel.

(e) Waterfront facility

—means a pier or dock where vessels are normally worked including a container compound operated by a carrier or direct employer.



(f) Qualified Shipper

—means the manufacturer or seller having a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the export cargo being transported and who is named in the dock/cargo receipt.

(g) Qualified Consignee

—means the purchaser or one who otherwise has a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the import cargo being transported and who is named in the delivery order.

(h) Consolidated Container Load

—means a container load of cargo where such cargo belongs to more than one shipper on export cargo or one consignee on import cargo.

Rule 1—Containers To Be Loaded or Discharged by Deepsea ILA Labor

(a) Cargo in containers referred to below shall be loaded into or discharged out of containers only at a waterfront facility by deepsea ILA labor:

(1) Containers owned, leased or used by carriers (including containers on wheels and trailers), hereinafter "containers", which contain consolidated container loads, which come from or go to any point within a geographic area of any CONASA port described by a 50-mile circle with its radius extending out from the center of each port, (hereinafter "geographic area") or

(2) Containers which come from a single shipper which is not the manufacturer ("manufacturer's label") into which the cargo has been loaded (consolidated) by other than its own employees and such containers come from any point within the "geographic area," or

(3) Containers designated for a single consignee from which the cargo is discharged (deconsolidated) by other than its own employees within the "geographic" area and which is not warehoused in accordance with Rule 2(B).

(b) Such ILA labor shall be paid and employed at deep-sea longshore rates under the terms and conditions of the deep-sea ILA labor agreement in each CONASA port, including the provisions for all fringe benefits and any and all other benefits receivable by deep-sea ILA craft workers in each such Port. No cargo shall be loaded into or discharged out of any container by ILA deep-sea labor more than once.

(c) All export consolidated cargo, described in 1(a) (1) and (2) above, shall be received at the waterfront facility by deep-sea ILA labor and such cargo shall be loaded into a container at the waterfront facility for loading aboard ship.

(d) All import consolidated cargo, described in 1(a) (1) and (3) above, shall be discharged from the container and the cargo placed on the waterfront facility where it will be delivered and picked up by each consignee.

(e) No carrier or direct employer shall supply its containers to any consolidator or de-consolidator. No



carrier or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all Rule 1 containers be loaded or discharged at a waterfront facility.

Rule 2—Containers Not to be Loaded or Discharged by ILA Labor

Cargo in containers referred to below shall not be loaded or discharged by ILA labor:

A. Export Cargo:

(1) All cargo loaded in containers outside the "geographic area".

(2) Containers loaded with cargo at a qualified shipper's facility with its own employees.

(3) Containers loaded with the cargo of a single manufacturer (manufacturer's label) at its facilities with its own employees.

(4) Consolidated container loads of mail, household effects of a person who is relocating his place of residence, with no other type of cargo in the container, or personal effects of military personnel.

(5) There shall be no general warehouse exception applicable to export cargo.

B. Import Cargo:

(1) All cargo discharged from containers outside the "geographic area".

(2) Containers discharged at a qualified consignee's facility by its own employees.

(3) Consolidated container loads of mail, household effects of a person who is relocating his place of business, with no other type of cargo in the container, or personal effects of military personnel.

(4) Containers of a qualified consignee discharged at a bona fide public warehouse within the "geographic area" which comply with all of the following conditions:

1. The container cargo is warehoused at a bona fide public warehouse.
2. The qualified consignee pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days; and stores the cargo for a minimum period of 30 days; and
3. The cargo being warehoused (a) in the normal course of the busines of the qualified consignee; (b) title to such goods has not been transferred from the qualified consignee to another.

The carrier on request will furnish all documentation and other information which permits the Container Committee in the port to determine whether conditions 1, 2 and 3 have been met. This exception shall not apply where cargo is warehoused for the purpose of avoidance or evasion of Rule 1. It is limited to containers warehoused as provided in the above conditions and any warehouse which does not conform to such conditions shall be deemed a consolidator or de-consolidator.



(Clarification: In keeping with prior CONASA-ILA decisions trucking stations where containers are unloaded within the geographic area do not constitute bona fide public warehouses even where cargo is destined for delivery outside the geographic area).

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Rule 7—No Avoidance or Evasion

The above rules are intended to be fairly and reasonably applied by the parties. To obtain non-discriminatory and fair implementation of the above, the following principles shall apply:

(a) Geographic Area—Agreement in the Port to the geographic area as provided in Rule 1 is based on present consolidated movement patterns in the port. Should any person, firm or corporation for the purpose of evading the provisions of the Rules on Containers, seek to change such pattern by shifting its operations to, or commencing new operations at, a point outside said agreed upon geographic area, then either party may raise the question whether said point should be included within the said geographic area, and upon agreement that the purpose of the shift in its operations was to evade the provisions of the Rules on Containers, then said point shall be deemed to be within the said geographic area for the purpose of these rules.

(b) Containers Owned, Leased or Used—Containers owned, leased or used by companies which are affiliated either directly or through a holding company with a carrier or a direct

employer shall be deemed to be containers owned, leased or used by a carrier or direct employer. Affiliation shall include subsidiaries and/or affiliates which are effectively controlled by the carrier or direct employer, its parent, or stockholders of either of them.

(c) Liquidated Damages—Failure to load or discharge a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 1 and Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been loaded or discharged under the Rules, then the carrier or its agent or direct employer shall pay, to the joint Container Royalty Fund, liquidated damages of $1,000 per container which should have been loaded or discharged. If any carrier does not pay liquidated damages within 30 days after exhausting its right to appeal the imposition of liquidated damages to the Committee provided in Rule 9(a) below, the ILA shall have the right to stop working such carrier's containers until such damages are paid.

(d) Any facility operated in violation of the Container Rules will not have service supplied to it by any direct employer and the ILA will not supply labor to such facility.



Rule 8—Renegotiation and Cancellation—No Arbitration

These Rules shall be in effect for the term of the CONASA-ILA Agreement, provided, however, that either party shall have the right to cancel the Rules on Containers at any time on or after December 1, 1974, on thirty (30) days written notice of a desire to renegotiate the provisions of these Rules. Negotiations shall be held during such thirty (30) day period and if the parties are unable to agree by the end of such period, these Rules shall be deemed cancelled. Thereafter, the ILA shall have the right to refuse to handle containers and CONASA shall have the right to refuse to hire employees under the said Rules. The negotiations referred to above shall, under no condition, be subject to the grievance or arbitration provisions of any CONASA-ILA Agreement.

Rule 9—Enforcement of the Rules on Containers

To assure effective, fair and non-discriminatory enforcement of the above Rules, the following regulations shall apply:

(a) A Committee in each CONASA port represented equally by management and union shall be formed and shall have the responsibility and power to hear and pass judgment on any violations of these Rules. Any inability to agree shall be processed as a grievance under the applicable contract except as limited by Rule 8 hereof. A joint committee, known as the CONASA-ILA Container

Committee, represented equally by management and labor and made up of representatives (to be mutually agreed upon) from each CONASA Port, namely, Boston, Rhode Island, New York, Philadelphia, Baltimore and Hampton Roads shall meet at least quarterly each year for the purpose of insuring uniformity in the interpretation of these Rules.

(b) A Committee of carriers, together with CONASA-ILA Container Committee will develop uniform documentation which shall be required to be prepared and maintained by all carriers in order to readily identify all Rule 1 containers which are subject to loading or discharging by deepsea ILA labor. It shall be the obligation of employer-members to clearly mark each container's documentation as to whether or not it is a Rule 1 container, which shall be loaded or discharged. If a container's documentation is not clearly marked, it shall be deemed a Rule 1 container and it shall be loaded or discharged by deepsea ILA labor at the waterfront facility. With respect to all containers received at or delivered from the waterfront facility, a record of the same shall be made by ILA Checkers or Clerks. All carriers will distribute to all other carriers any and all information and devices which are being used by any person to circumvent the Rules on Containers. Any carrier whose attention is brought to a violation of the Rules shall immediately cease such violation and report the matter to the appropriate CONASA-ILA Container



Committee and to the policing agency provided in (e) below in its port.

(c) Every import container destined to a point within 50-miles of a CONASA Port shall be delivered only on a delivery order. Every export container coming from a point within 50-miles of a CONASA Port shall be received only on a dock/cargo receipt. Such delivery orders and dock/cargo receipts shall certify the place of delivery and origin of the container, the name or names of the person to whom the cargo is being delivered and from which it is shipped, the identity of the owner of the cargo, weight of the cargo, identity of the cargo and the origin and final destination of the container. Copies of such delivery orders and dock/cargo receipts shall be available to, the local port Container Committee and the policing agency provided for in (e) below.

(d) The Container Committee in each CONASA Port shall promulgate to all carriers and direct employers, and to the Container Committees in each CONASA Port, any and all interpretations of the Rules on Containers as and when they are made. This will include uniform interpretations as and when they are issued. The CONASA-ILA Container Committee shall also promulgate uniform interpretations to local port Container Committees, as and when they are issued.

(e) Policing Agency—Each CONASA Port shall establish a method of policing and enforcing these Rules on a uniform and non-discrimi-

natory basis. No such method shall be implemented until presented to and approved by the joint CONASA-ILA Container Committee.

(f) Council of Container Carriers—There shall be organized promptly a Council of Container Carriers composed of representatives of every major container carrier who, subject to the direction of CONASA, shall meet with the ILA at all regular and special meetings of the CONASA-ILA Container meetings, and who shall participate in the discussion and resolution of problems and interpretations of the Container Rules discussed at the said meetings.

(g) Powers of CONASA-ILA Container Committee—In order to permit the fair and nondiscriminatory application of the Rules and to encourage the movement of cargo in all CONASA-ILA ports, the CONASA-ILA Container Committee is hereby empowered to make such amendments or modifications to these Rules as may be necessary to the equitable application of the principles of these Rules to particular cases.

Rule 10—Container Royalty Payments

The two Container Royalty payments required by the CONASA-ILA collective bargaining agreements shall be payable only once in the Continental United States. They shall be paid in that ILA Port where the container is first handled by ILA longshore labor



at longshore rates. The second container royalty payment (provided by paragraph 6 of the 1971-1974 CONASA-ILA Memorandum of Agreement) shall be continued and shall be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port by port basis. Containers originating at a foreign port which are transshipped at a United States port for ultimate destination to another foreign port ("foreign sea-to-foreign-sea containers") are exempt from the payment of container royalties. Container royalty payments shall be assessed against all containers moving across the continental United States by rail or truck under the foreign-to-foreign "LAND-BRIDGE" system. The said royalty payments shall become due for all such containers moving through CONASA-ILA ports on and after July 1, 1975.

Rule 11—Execution of Agreement

All carriers utilizing ILA labor in handling containers in any of the CONASA ports shall be bound by the CONASA-ILA Rules on Containers, and shall be required to execute the agreement between CONASA and ILA containing the said Rules on Containers. No contracting stevedore shall perform services for any carrier, private or governmental, unless such carrier has subscribed to this agreement as aforesaid.

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